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85-5141

No. A-967

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

V.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Roger LeRoy DeGarmo, a/k/a Quinton Earl Combest, files this his Petition For Writ of Certiorari To the Texas Court of Criminal Appeals.

SCHWARTZ, KALINOWSKI & HARTFIEL
1821 Mons Avenue,
Rosenberg, Texas, 77471
Phone: 713-342-2806

By: Ken Hartfiel
Ken Hartfiel
Attorney for Petitioner
Bar #09155500

OF COUNSEL:
Don T. Schwartz
Don T. Schwartz
Bar #17862000

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Texas Court of Criminal Appeals that Petitioner waived his right to contest the sufficiency of the evidence is in conflict with this Court's opinions in Burks v. United States, 437 U.S. 1 (1978) and Greene v.Massey, 437 U.S. 19 (1978).

2. Did the consummation of the plea bargain agreement between the State and Petitioner's Co-Defendant some eighteen (18) months after Petitioner's trial deprive Petitioner of his right for the jury to know about any agreement between the prosecution and the Co-Defendant?

3. Is the punishment of Petitioner, who received the death penalty, so arbitrary, capricious and disproportionate in light of that of his Co-Defendant, who was placed on probation and the proceedings against her deferred for ten (10) years, as to constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments?

II.

LIST OF PARTIES

Roger LeRoy DeGarmo a/k/a Quinton Earl Combest

The State of Texas

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V.

OPINIONS

Roger DeGarmo, a/k/a Quinton Earl Combest v. The State of Texas, No. 69,027, (Tex. Cr. App. 1985)

VI.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Date of Judgment: March 13, 1985, Court of Criminal Appeals of Texas.

2. Rehearing denied, April 24, 1985, Court of Criminal Appeals of Texas.

3. Order Extending Time To File Petition For Writ Of Certiorari, June 14, 1985, by Associate Justice White. (Time extended to and including July 23, 1985).

4. Supreme Court Rule 17.

28 U.S.C. 1257 (3)

VII.

CONSTITUTIONAL PROVISIONS

Eighth Amendment, United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII.

STATEMENT OF THE CASE

Petitioner, Roger LeRoy Degarmo, was convicted by a jury in the 240th District Court of Fort Bend County for the kidnapping and murder of Kimberly Ann Strickler. Evidence adduced at trial showed that Petitioner and Helen Mejia, who was also indicted for capital murder, abducted Ms. Strickler at a shopping center parking lot in Houston, Texas, placed her in the trunk of her car, and drove her to a rural area southwest of Houston, where, at Mejia's urging, Petitioner shot Ms. Strickler to death.

Helen Mejia testified for the State in Petitioner's trial. Her attorney testified that the State had made no promises to her in exchange for her testimony, except that she would not be prosecuted for capital murder. Approximately eighteen (18) months after Petitioner's trial, Helen Mejia and the Fort Bend County District Attorney's Office entered into a plea bargain agreement that provided in exchange for a plea of guilty to the offense of murder, Helen Mejia was placed on probation and the proceedings against her were deferred for a period of ten (10) years.

Petitioner testified at the punishment phase of his trial, admitted his guilt, and demanded that the jury assess his punishment as death by lethal injection.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals affirmed Petitioner's conviction on March 13, 1985, and denied his Motion for Rehearing on April 24, 1985.

The questions presented for review in this Petition were raised in Petitioner's brief in the Court of Criminal Appeals of the State of Texas, No. 69,027, Roger DeGarmo, Appellant Vs. the State of Texas, Appellee. The questions were presented as Grounds of Error and were rejected by the Court of Criminal Appeals of the State of Texas in its opinion delivered March 13, 1985, a copy of which is included in the Appendix to this petition.

IX.

REASONS FOR ALLOWANCE OF THE WRIT

The Writ should be allowed because this is a death penalty case in which there are serious constitutional questions to be answered.

This Court should decide whether the Texas rule that a criminal defendant who does not testify at the guilt stage of his trial but does make a judicial confession at the punishment phase cannot question the sufficiency of the evidence on appeal, Lasker v. State, 573, S.W. 2d 539 (Tex. Cr. App. 1978), Garcia v. State, 522 S.W. 2d 203 (Tex. Cr. App. 1978), Boothe v. State, 474 S.W. 2d 219 (Tex. Cr. App. 1971) conflicts with this Court's opinions in Burks v. United States, 437 U.S. 1 1978) and Greene v. Massey, 437 U.S. 19 (1978). Burks and Greene hold that a reversal for insufficient evidence entitled the Appellant to an acquittal. These cases require that in testing the sufficiency of the evidence on appeal, the Appellate Court must evaluate the evidence as it was presented to the jury in deciding the guilt or innocence of the accused. The Texas rule places the accused in a position of either remaining silent and testing the sufficiency of the evidence on appeal, or taking the stand and allowing the State to use his testimony at the punishment phase to make up for its otherwise insufficient case. The Texas rule is especially onerous in Texas' bifurcated system because after conviction, the Defendant often takes the stand at the punishment stage of the proceedings.

The second reason this Court should allow the Writ is because the prosecution's handling of the plea bargain agreement with the Petitioner's Co-Defendant denied him of his right to have the jury know about any agreement or understanding that might have existed between said Co-Defendant and the prosecution. Giglio v. United States, 405 U.S. 150 (1972). The Co-Defendant's attorney testified that the only agreement or understanding between his client and the prosecution was that she would not be prosecuted for capital murder. Eighteen (18) months later, the Co-Defendant, who was originally charged with capital murder, plead guilty, was placed on probation and the proceedings against her were deferred for ten (10) years. The jury had a right to know about this arrangement. Permitting the State to deny that an agreement existed, and then permitting the State to give the Co-Defendant a remarkable lenient punishment of which the jury was not aware, denied the Petitioner his right of confrontation. Also, the fact that the State delayed approximately eighteen (18) months before disposing of the Co-Defendant's case smacks of

an intentional, planned course of conduct to deny Petitioner his right of confrontation.

The third reason for this Court to allow the Writ is because the punishment of Petitioner at death, while his Co-Defendant was placed on probation, is so disproportionate as to be violative of the Eighth and Fourteenth Amendments. Furman v. Georgia, 408 U.S. 238 (1972). A system which allows such systemic arbitrariness and capriciousness and permits the sentence of death to be so wantonly and freakishly imposed, should not be tolerated. The Writ should be allowed to permit appellate review to eliminate such disproportionality and arbitrariness in punishment. Failure to provide for such review vests essentially unfettered discretion in prosecutors to impose the death penalty, which is a defect in the statutory scheme of the type invalidated by Furman and prohibited by the Eighth and Fourteenth Amendments.

Given the extreme nature of the punishment in Petitioner's case and the importance of the constitutional questions posed herein, Petitioner urges this Court to accept his case for review and grant his Petition For Writ of Certiorari To The Texas Court of Criminal Appeals.

A-967

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

CERTIFICATE OF SERVICE

I, Ken Hartfiel, Attorney for Roger LeRoy DeGarmo, a/k/a/ Quinton Earl Combest, Petitioner in the above cause, certify that a true and correct copy of Petitioner's Motion For Leave To Proceed In Forma Pauperis, Affidavit of Counsel, Affidavit of Poverty, and Petition For Writ of Certiorari to the Texas Court of Criminal Appeals was mailed to the Hon. Jim Mattox, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, Mr. Thomas F. Lowe, Clerk, Court of Criminal Appeals, P. O. Box 12308, Capitol Station, Austin, Texas, 78711, and Mr. William A. Meitzen, District Attorney, Fort Bend County Courthouse, Richmond, Texas, 77469, by Certified Mail, Return Receipt Requested, on this the 22nd day of July, 1985.

Ken Hartfiel

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Ken Hartfiel, this 22nd day of July, 1985, to certify which witness my hand and seal of office.

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires: BARBARA GIBSON NOTARY PUBLIC MY COMMISSION EXPIRES 7-2-88

No. A-967

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER LeROY DeGARMO, A/K/A QUINTON EARL COMBEST,

Petitioner

V.

STATE OF TEXAS,

Respondent

STATEMENT PURSUANT TO RULE 28.2

I, Don T. Schwartz, hereby state that I am a member of the Bar of this Court, that Petitioner's Motion For Leave to Proceed In Forma Pauperis, Affidavit of Counsel, Affidavit of Poverty, and Petition For Writ of Certiorari to the Texas Court of Criminal Appeals was deposited in the United States Post Office at Rosenberg, Texas, 77471, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowing for filing of same, on the 22nd day of July, 1985, and to my knowledge that the mailing of said documents took place on that date and within the permitted time for filing said documents.

Don T. Schwartz
Bar #17862000

SWORN TO AND SUBSCRIBED BEFORE ME by the said Don T. Schwartz, this 22nd day of July, 1985, to certify which witness my hand and seal of office.

NOTARY PUBLIC, STATE OF TEXAS

BARBARA GIBSON NOTARY PUBLIC MY COMMISSION EXPIRES 7-2-88

My Commission Expires:

APPENDIX

Copy of opinion of Court of Criminal Appeals of Texas, No. 69,027, Roger DeGarmo, a/k/a Quinton Earl Combest vs. The State of Texas (March 13, 1985).

ROGER DE GARMO, aka QUINTON EARL COMBEST,
Appellant
NO. 69,027 vs. - - - APPEAL FROM FORT BEND COUNTY

THE STATE OF TEXAS, Appellee

O P I N I O N

Roger De Garmo, aka Quinton Earl Combest, appellant, murdered Kimberley Anne Strickler, a young lady who was only twenty (20) years of age at the time of her untimely death. After finding appellant guilty of capital murder, the jury returned affirmative findings to special issues that were submitted to it by the trial judge pursuant to Art. 37.071 (b), V.A.C.C.P. Based upon the jury's answers, the trial judge assessed appellant's punishment at death.

Appellant was accompanied and assisted by an accomplice--Helen Leydalia Mejia--when he kidnapped and later murdered Strickler. Mejia testified for the State. As a result of a plea bargain agreement with the prosecution, but after appellant's trial, Mejia received ten (10) years' deferred probation for her participation in the abduction and murder of Strickler.

We affirm appellant's conviction and sentence of death.

We overrule appellant's challenge to the sufficiency of the evidence to sustain the jury's verdict finding him guilty of capital murder.

The record on appeal reflects that appellant and Mejia kidnapped Strickler in Harris County after she befriended them by giving them a ride in her automobile. Appellant later forced Strickler to get inside the trunk of her motor vehicle, after which he closed and locked the trunk lid. Later, after driving to a location in Fort Bend County, appellant opened the trunk lid of Strickler's vehicle. Acting with a state of mind which showed a heart regardless of social duty and fatally bent on mischief, appellant then deliberately and intentionally fired one bullet from a pistol into Strickler's head, which wound caused Strickler to die almost instantaneously. Because appellant intentionally murdered Strickler in the course of committing the offense of kidnapping, he is guilty of capital murder. See V.T.C.A., Penal Code, Section 19.03 (a) (2).

When he testified, appellant also threatened the jurors with death if they answered the special issues submitted to them in such a way that he, appellant, would only receive life imprisonment. He told the jurors that if that happened, i.e., that if he only received a life sentence, he would eventually, either acting individually or in conspiracy with others, cause each juror to die, or, if the juror was no longer alive, he would cause members of the juror's family to die. Appellant made no bones about what he intended to do if the jury's verdict did not result in him receiving the death penalty: "I'm not threatening, I'm promising that if and when some catastrophe happens and I was put back on the street, if you are not available, somebody of your possession would be and I would just say my statement is you should give me the death penalty because that's the only way you're ever going to stop me because you have put me in this position. . . I'm going to die any way, so why not take with me some of the people that's going to make me die. That's the way I feel. . . so you better . . . put the 'Yes' on both of them questions from my point of view."

And the record reflects that the jurors did as appellant requested--they answered both special issues in the affirmative, which caused the death penalty to become the only penalty that the trial judge could assess.

In asserting that the evidence is insufficient to sustain the jury verdict finding him guilty of capital murder, appellant acknowledges that the present law in Texas is that if a defendant does not testify at the guilt stage of the trial, but does testify at the punishment stage of the trial, and admits his guilt to the crime for which he has been found guilty, he has, for legal purposes, entered the equivalent of a plea of guilty. The law as it presently exists is clear that such a defendant not only waives a challenge to the sufficiency of the evidence, but he also waives any error that might have occurred during the guilt stage of the trial. In this instance, appellant unequivocally admitted his guilt to the capital murder of

Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Berry, 670 F.2d 583, 588 (5th Cir.1982); Sutherlin v. State, 682 S.W.2d 546, 548-549 (Tex.Cr.App.1984).

Notwithstanding that we find and hold that appellant's admissions that were made at the punishment stage of the trial constitute waiver of his challenge to the sufficiency of the evidence, we have carefully reviewed the evidence, and have done so without even considering Mejia's testimony, and find that circumstantially[1/] the evidence is more than sufficient to sustain the verdict of the jury, and would permit a rational trier of fact to find guilt beyond a reasonable doubt. Appellant's ground of error that the evidence is insufficient to sustain the capital murder verdict of the jury is overruled.[2/]

Appellant asserts in his second ground of error that "one on trial for his life should not be subject to a conviction and a death penalty when his co-defendant, and the principal witness against him, (subsequently) receives a sentence of remarkable leniency, and the jury is not informed of that fact."

We find that appellant's contention centers upon the fact that almost eighteen months after appellant's trial, the office of the local district attorney entered into a plea bargain agreement with Mejia that was consummated when the trial judge approved the agreement. The plea bargain agreement that was placed into effect provided that in exchange for a plea of guilty to the lesser offense of murder, Mejia was placed on adult probation and the proceedings against her were deferred for a period of ten (10) years.

Considering the active role that Mejia played throughout the ordeal that Strickler was put through prior to appellant needlessly shooting her in the head, and her participation in the robbery and abduction of Moers, and notwithstanding Mejia's claim that she acted at all times under some form of duress, we are inclined to agree with appellant that the punishment Mejia received is relatively light.

[1/] The jury was instructed that this was "a case depending for conviction on circumstantial evidence," and was also instructed on the law of circumstantial evidence. In Hankins v. State, 646 S.W.2d 191, 197 (Tex.Cr.App. 1981) (On State's Motion for Rehearing), this Court held that even when a case is dependent upon circumstantial evidence for conviction, an instruction on the law of circumstantial evidence no longer must be given by the trial court.

[2/] In Adams v. State, -S.W.2d- (Tex.Cr.App. 1985), delivered February 27, 1985, this Court rejected the assertion that appellant makes in this cause, that when the prosecution uses an accomplice witness to establish its case against the accused, the sufficiency of the evidence must be reviewed by examining the evidence independent of the accomplice witness' testimony in order to make the determination whether the evidence is sufficient beyond a reasonable doubt to convict the defendant of the crime which he is accused of committing.

Although we believe that it was probably obvious to the jury that in addition to not being charged with the offense of capital murder, Mejia had the hope or expectation that at some time in the future the State would recommend some specific form of leniency as to punishment, nevertheless, we do not find anything in the record on appeal that would reflect or indicate that the jury was misled into believing that, in addition to what they were informed, there might have been some other "deal," "arrangement," or "tacit understanding" that might have existed between Mejia and the local prosecuting attorney when Mejia testified against appellant.

Appellant also appears to argue under this ground of error that because Mejia, his co-defendant, was assessed a punishment that was what he claims disproportionate to his sentence of death that this, without more, is violative of the Eighth Amendment to the Federal Constitution. We disagree.

The death penalty that appellant has been assessed is not cruel and unusual punishment. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). There is no constitutional requirement that a co-defendant who testifies for the prosecution must receive the same punishment as the defendant has received, nor is there any constitutional requirement that a comparative proportionality review of appellant's death sentence must be made by an appellate court. Pulley v. Harris, 465 U.S.-, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Appellant's second ground of error is overruled.

Appellant asserts in his third and last ground of error that the trial court erred when it, over objection, refused to delete the following underscored portion from the first special issue that the jury was asked to answer: "Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Roger Leroy DeGarmo, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the